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7 **UNITED STATES BANKRUPTCY COURT**
DISTRICT OF NEVADA

8	In re:	Case No. 09-17390-bam
9	JAMES R. THOMAS	Chapter 11
10	and	Hearing Date: November 16, 2009
11	DANIELLE THOMAS,	Hearing Time: 9:00 A.M.
12	Debtors.	Courtroom: 3

13

14 **MOTION TO VALUE COLLATERAL, “STRIP OFF” AND MODIFY RIGHTS OF**
SPECIALIZED LOAN SERVICING PURSUANT TO 11 U.S.C. §506(a) AND §1123

15 TO: THE HONORABLE BANKRUPTCY JUDGE BRUCE A. MARKELL
 16 JAMES R. THOMAS and DANIELLE THOMAS (hereinafter referred to as “Debtors”),
 17 by and through their attorneys, COLEMAN LAW ASSOCIATES, A PROFESSIONAL LAW
 18 CORPORATION, move this Court pursuant to 11 U.S.C. §506(a) AND §1123, and Bankruptcy
 19 Rules 3012 and 9014 and state:

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22 **STATEMENT OF FACTS**

23 1. Debtors filed a Voluntary Petition under Chapter 11 of the United States Code, Case
 24 Number 09- 17390-lbr on May 8, 2009.

25 2. On the petition date, Debtors owned real property located at 9721 Falling Star

1 Avenue, Las Vegas, NV 89117, as their primary residence (hereinafter referred to as "**Subject**
2 **Property**").

3 3. The estimated value of the Subject Property was \$256,212.00 at the time the
4 instant petition was filed.

5 4. The current value of the Subject Property is \$251,955.00 (See Property Valuation,
6 attached hereto as **Exhibit “A”** and incorporated for reference).

7 5. At the time of filing the instant petition, the Subject Property was subject to the
8 following liens:

17 6. Therefore, on the date the instant bankruptcy was filed, no equity existed in the
Subject Property above the claims of AMERICA'S SERVICING COMPANY.

LEGAL ARGUMENT

8. 11 U.S.C. §506(a) provides that a creditor's claim is only *secured* to the extent of
24 the property value: "a lien on property ... is a secured claim to the extent of the value of such

1 creditor's interest ... and is an unsecured claim to the extent that the value of such creditor's interest
 2 is less than the amount of such allowed claim."

3 9. In *In re Zimmer*, 313 F.3d 1220 (9th Cir.2002), the Court stated that a wholly
 4 unsecured lien holder's claim can be modified and reclassified as a general unsecured claim
 5 pursuant to 11 U.S.C. §506(a). Specifically, the Court held:

6 Section 506(a) divides creditors' claims into "secured
 7 claims" and "unsecured claims." Although the conventional
 8 interpretation of "secured" might include any claim in which
 9 the creditor has a security interest in the Debtor's property,
 10 §506(a) makes clear that the status of a claim depends on the
 11 valuation of the property. An allowed claim of a creditor
 12 secured by a lien on property in which the estate has an interest
 13 ... is a secured claim to the extent of the value of such creditor's
 14 interest in the estate's interest in such property ... and is an
 15 unsecured claim to the extent that the value of such creditor's
 16 interest ... is less than the amount of such allowed claim.

17 To put it more simply, a claim such as a mortgage is not a
 18 "secured claim" to the extent that it exceeds the value of the
 19 property that secures it. Under the Bankruptcy Code, "secured
 20 claim" is thus a term of art; not every claim that is secured by
 21 a lien on a property will be considered a "secured claim". Here,
 22 it is plain that PSB Lending's claim for the repayment of its
 23 loan is an unsecured claim, because its deed of trust is junior to
 24 the first deed of trust, and the value of the loan secured by the
 25 first deed of trust is greater than the value of the house.

26 10. Accordingly, since SPECIALIZED LOAN SERVICING's claim is wholly unsecured
 27 (in that there is no extant equity above the first mortgage in the Subject Property), the Court should
 28 reclassify SPECIALIZED LOAN SERVICING's claim to a general unsecured claim to receive
 29 payments pro rata with like unsecured creditors. SPECIALIZED LOAN SERVICING should also
 30 be stripped of its secured rights under 11 U.S.C. §506(a) since no maintainable security interest in
 31 the Subject Property exists.

32 11. Further, the Debtor is not required to file an adversary proceeding to achieve the
 33 requested relief herein. Debtor may bring a motion to "strip off" SPECIALIZED LOAN
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1 SERVICING's consensual lien by motion. See *In re Williams*, 166 B.R.615 (Bankr.E.D.Va.1994),
 2 *In re Fuller*, 255 B.R. 300 (Bankr.W.D.Mich.2000), *In re Hoskins*, 262 B.R. 693
 3 (Bankr.E.D.Mich.2001), *In re King*, 290 B.R. 641 (Bankr.C.D.Ill.2003), *In re Millspaugh*, 302 B.R.
 4 90 (Bankr.D.Idaho 2003), *Dickey v. Ben. Fin. (In re Dickey)* 293 B.R. 360 (Bankr.M.D.Pa.2003),
 5 *In re Hill*, 304 B.R. 800 (Bankr.S.D. Ohio 2003); *In re Sadala* 294 B.R. 180 (Bankr.M.D.Fla.2003),
 6 *In re Fisher*, 289 B.R. 544 (Bankr.W.D.N.Y.2003), *In re Robert*, 313 B.R. 545
 7 (Bankr.N.D.N.Y.2004), *In re Bennett*, 312 B.R. 843 (Bankr.W.D.Ky.2004). Instead, Debtor may
 8 bring the instant motion.

9 **WHEREFORE**, Debtor prays that this Court:

10 1. Find that SPECIALIZED LOAN SERVICING is not a holder of a lien on the Subject
 11 Property.

12 2. Immediately avoid, "strip off", cancel and extinguish SPECIALIZED LOAN
 13 SERVICING's wholly unsecured claim/lien from the Subject Property pursuant to 11 U.S.C. Section
 14 506(a).

15 3. Reclassify SPECIALIZED LOAN SERVICING's claim as a general unsecured
 16 claim, subject to allowance if disputed, to be paid pro rata with other general unsecured creditors
 17 through the Debtor's Chapter 11 Plan; and

18 4. Such other relief as the Court finds appropriate.

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 20 DATED this 13th day of October, 2009.

21 COLEMAN LAW ASSOCIATES, APLC

22 By: /s/ Elizabeth DeFlyer, Esq.

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1 **LIST OF EXHIBITS**
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3 **EXHIBIT A:**
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5 **PROPERTY VALUATION**
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7 9721 Falling Star Avenue
8 Las Vegas, NV 89117
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10 **EXHIBIT B:**
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12 **PROOF OF CLAIM No.10**
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14 U.S. Bankruptcy Court Claim #10 - filed by Creditor, AMERICA'S SERVICING COMPANY
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